90-1086

(1)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROGER ATKINSON; POLLY ATKINSON;
and ROGER ATKINSON AND POLLY ATKINSON,
as guardians ad litem for CHAD ATKINSON,

Petitioners,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE, HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I THROUGH X,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT J. DEBRY
Counsel of Record
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
(801) 262-8915
Counsel for Petitioners

QUESTIONS PRESENTED

Whether a child's right to due process was denied when a probate court judge approved an inadequate settlement agreement, with no evaluation of the underlying medical malpractice claim.

When there is credible conflicting evidence on material fact issues, is a plaintiff's Seventh Amendment right to a jury trial and/or procedural right to due process denied when the appellate court, in upholding a summary judgment, weighs the evidence and concludes that a reasonable jury would not enter a verdict in favor of the plaintiffs?

List of Parties and Rule 29.1 Statement

The parties to the proceedings below were the petitioners Roger and Polly Atkinson for themselves and as Guardians Ad Litem for Chad Atkinson and the respondents: IHC Hospitals, Inc., aka Intermountain Health Care Hospitals, Inc.; Scott Wetzel Services, Inc.; Wetzel's employee Scott Olsen; Stephen G. Morgan and his law firm Morgan, Scalley & Reading.

There are no parent or subsidiary corporations requiring disclosure under Rule 29.1 of the Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No.

ROGER ATKINSON; POLLY ATKINSON;
and ROGER ATKINSON AND POLLY ATKINSON,
as guardians ad litem for CHAD ATKINSON,

Petitioners,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN
HEALTH CARE, HOSPITALS, INC., a Utah
corporation, SCOTT WETZEL SERVICES, INC.,
a corporation, SCOTT OLSEN; STEPHEN G.
MORGAN; MORGAN, SCALLEY & READING; and
JOHN DOES I THROUGH X,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Roger and Polly Atkinson, the petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the Utah Supreme Court entered in the above entitled case on July 3, 1990. A timely petition for rehearing was denied on September 25, 1990.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported as Atkinson v. IHC Hospitals, Inc., 798 P.2d 833 (Utah 1990) and is printed in Appendix hereto, p. A-1, infra. The summary judgments of the Third Judicial District Court have not been reported. They are printed in the Appendix p. A-19, infra.

JURISDICTION

The opinion and judgment of the Utah Supreme Court was entered on July 3, 1990. A timely petition for rehearing was denied on September 25, 1990. (Appendix p. A-22.) The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the statutes involved are:

U.S. CONST. amend. VII.
U.S. CONST. amend. XIV, § 1.
UTAH CONST. art. I, § 10.
Utah Rules of Civil Procedure, 56.

Copies are set forth in the Appendix, p. A-23, infra.

STATEMENT OF THE CASE

This is a petition for certiorari to review summary judgments upheld by the Utah Supreme Court which denied the petitioners ("the Atkinsons") claims for malpractice against Atkinsons' former attorney and for misrepresentation against their son's health care provider.

Chad Atkinson, a minor, suffered permanent and extensive brain damage while a patient at Primary Children's Medical Center, a facility owned and operated by Intermountain Health Care Hospitals, Inc. ("IHC"). His parents and guardians are Roger and Polly Atkinson.

Chad was born on March 2, 1983. Later, while a patient at IHC, Chad aspirated, filling his lungs with digestive material. Previously, the IHC nurse shut off the monitoring machine's warning device. Chad was deprived of oxygen which caused him to suffer extensive and permanent brain damage.

IHC subsequently misrepresented the medical condition of the child to the parents. IHC's doctors told the Atkinsons that with therapy and treatment their child would be normal and healthy.

Within a few days after the child was discharged from the hospital, IHC and its insurance adjuster, Scott Wetzel

Services, Inc. ("Wetzel") requested the Atkinsons to attend a meeting. After four or five meetings, Wetzel presented to the Atkinsons what they understood as IHC's final offer. Wetzel explained to the Atkinsons that the child had only a minor handicap and that the Atkinsons were getting free money.

The Atkinsons asked about seeing an attorney. Wetzel recommended Steve Morgan ("Morgan") because Morgan did not represent IHC and Wetzel believed that Morgan would be concerned for the Atkinsons. The Atkinsons subsequently consulted with Morgan because he was recommended by Wetzel.

Morgan met the Atkinsons at his office and told them he would represent and help them. At this time, Morgan also represented Wetzel but he did not disclose his adverse representation to the Atkinsons. Morgan did not investigate the facts of the underlying claim and he did not advise the Atkinsons to seek other counsel. The Atkinsons asked Morgan if he thought the proposed settlement was fair. Morgan told them that the probate court would not approve the settlement unless it was fair. Morgan prepared the settlement and conservatorship papers, but only partially explained the documents to the Atkinsons. Subsequently,

Morgan called the court and arranged for an informal probate court hearing before Judge Fishler.

Morgan appeared at the hearing with the Atkinsons and told the court he represented "them." At the hearing the Atkinsons believed that Morgan was their lawyer. They did not know that Morgan, in fact, represented IHC at the hearing. If they had known that fact they would not have agreed to a settlement without consulting another lawyer.

At the time of the hearing, the Atkinsons were eighteen and sixteen years old. Neither of them had progressed beyond the tenth grade in education. Indeed, the father was and is illiterate. The settlement was structured with a then present day value of $118,000 plus medical care until the child reaches age 15.

The court approved the conservatorship and the proposed settlement. However, the probate court did not investigate the underlying claim. Subsequently, Morgan changed the settlement papers and after the hearing obtained the Atkinsons' signatures on the altered settlement documents. One of the changes prevents the Atkinsons, from suing other tort feasors without IHC's consent. The change was not approved by the probate court.

The Atkinsons did not know their child was going to be less than normal until he was a little over three years old. At that time, Chad began to suffer severe seizures. Currently, he does not walk. He does not talk. He is a vegetable.

The Atkinsons sued Morgan and his law firm for malpractice. They sued IHC, Scott Wetzel and Wetzel's employee Scott Olsen for fraud and misrepresentation.

Subsequently, Wetzel, its employees and IHC moved for summary judgment. Wetzel and IHC did not contest the factual elements of fraud. Instead, they argued:

1. The court approved settlement and release barred the claim;
2. The court approved settlement collaterally estopped the claim;
3. The Atkinsons must either rescind the settlement agreement or affirm the agreement, and until they do, they can't sue for fraud;
4. The medical malpractice statute of limitations bars the Atkinsons' claim.

Morgan and his law firm also moved for summary judgment. The grounds for the motion were:

1. Morgan was not their attorney. (There was contrary evidence showing otherwise.);

2. His negligence could not have caused the Atkinsons the damage because the Atkinsons negotiated the settlement for their son prior to seeing him. (The Atkinsons, in their deposition, testified otherwise.);
3. The probate court approved the settlement so the Atkinsons couldn't sue him. (The probate court did not evaluate the underlying claims of their son.);
4. The Atkinsons could only sue for recession or affirm the contract. They could not sue Morgan.

The trial court granted the defendants' motion for summary judgment. No findings or conclusions were filed by the trial court.

The Utah Supreme Court upheld the summary judgments. However, the Utah Supreme Court did not consider the issues raised by IHC, Wetzel and Morgan. Instead, the Utah Supreme Court, for the first time in the litigation, ruled that there was no genuine issue of material fact and that the probate proceedings were valid in every way. Specifically, the court said:

1. The Atkinsons did not consider Morgan to be their attorney because the court documents showed that he represented IHC; there is no written retainer agreement; and at the probate hearing, the Atkinsons told the court that they had talked to a lawyer.

The Court, in reaching the above conclusion, ignored the following evidence: Morgan told the Atkinsons he would be their lawyer; at the hearing, Morgan told the court he represented "them"; Wetzel recommended Morgan to the Atkinsons as a lawyer because he believed Morgan would be concerned for the Atkinsons; Morgan rendered legal advice and partially explained the settlement papers to the Atkinsons; and the Atkinsons explained that the lawyer they told the probate court they had consulted with, was Morgan.

2. The court also ruled Morgan did not provide legal advice because the Atkinsons did not consider Morgan to be their attorney.

3. The Utah Supreme Court, also ruled that Morgan could not be liable for volunteering legal advice because the Atkinsons did not rely on it. The Utah Supreme Court noted that the probate court transcript showed that the Atkinsons believed the settlement was in the best interest of their child. The Atkinsons' father was a union negotiator who met once with Wetzel so the Atkinsons must have relied on the father and not Morgan.

4. The Utah Supreme Court ruled that IHC and Wetzel had not misrepresented the condition of the child because:

IHC would not have agreed to pay the structured settlement if the child was going to be normal; the Atkinsons were adults; the release says that the child may not be normal; and the Atkinsons declined to have their child tested in Arizona.

In coming to the foregoing conclusions, the Utah Supreme Court ignored direct deposition testimony by the Atkinsons that the IHC doctors and Wetzel's employees told them that their child would be fine with a little therapy; a letter from an IHC doctor saying that the child was developing at an age fashionable level; that the Atkinsons at the time they consulted with Morgan were not sure they should settle. That's why they saw Morgan. The Atkinsons never read the settlement papers and Morgan changed the settlement papers after they were presented at the court hearing; and the Atkinsons declined to have their child tested in Arizona because Wetzel told them the offer could be reduced if the test confirmed Wetzel's opinion that the child only had a minor handicap.

The court did not rule on the election of remedy, collateral estoppel and statute of limitations issues except to say "We have duly considered the Atkinsons' other claims and found them to be without merit. Atkinson v. IHC Hospital, Inc. 798 P.2d 733, 38 (Utah 1990).

Finally, the Utah Supreme Court held that even though the probate judge did not evaluate the underlying medical malpractice claim, the probate hearing was conducted in a jurisprudential manner.

The Atkinsons filed a Petition for Rehearing. The petition stated:

A. The infant had a due process right to have his claim evaluated by the probate court, a right which he never received.

B. The court's weighing of credible conflicting evidence denied the Atkinsons their constitutional right to a jury trial.

Portions of the petition showing that the federal questions were raised are set forth in the Appendix p. A-27, infra.[1]

The petition for rehearing was denied on September 25, 1990. This petition for certiorari was timely filed.

---

[1] The raising of the infant's due process right to have a court evaluate the underlying claim was raised somewhat indirectly. Petitioners contended that the child as a ward of the court was entitled to the evaluation and cited Missouri Pac. Ry. Co. v. Lasca, 79 Kan. 34, 99 P. 616, 18-19 (1909) ("[T]he settlement can only become effective when given judicial sanction . . . and this must be upon a real and not perfunctory hearing; * * * upon due judicial examination.")

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A CHILD'S RIGHT TO DUE PROCESS WAS DENIED WHEN THE COURT APPROVED THE PARENT'S SETTLEMENT AGREEMENT WITHOUT EVALUATING THE UNDERLYING MEDICAL MALPRACTICE CLAIM

A. Factual Background.

The minor suffered extensive brain damage because the nurse shut off the warning device monitoring the child. The child does not walk or talk. He is a vegetable.

The parents, neither of which are high school graduates, negotiated an inadequate settlement with IHC and its agent, Wetzel. The value of the settlement is $118,000 plus medical care until the child reaches the age of 15.

At the probate court hearing, the parents acted as the guardian or conservator for the child. Depending upon a fact finder's view of the evidence, the parents either represented themselves or were represented by an attorney who also represented IHC and Wetzel.

The court hearing was a summary proceeding arranged by a telephone call from Morgan without any formal notice. At the hearing, the judge merely asked if the parents thought the settlement was adequate. The judge did not evaluate the underlying claim.

[To the Probate Court Judge:]

Q: [Y]ou didn't evaluate the underlying claim against IHC, did you?

A: No, I didn't.

(Deposition of Probate Judge Philip Fishler, March 30, 1988, p. 51.)

B. Legal Analysis.

Section 1 of the Fourteenth Amendment prohibits any state from depriving any person of life, liberty or property without due process of law.

The right to due process applies to minors. Belloti v. Baird, 443 U.S. 622 (1979); In Re Gault, 387 U.S. 1 (1967). Indeed, it is an ancient precept of Anglo-American jurisprudence that infants and other incompetent parties are wards of any court called upon to measure and weigh the child's interests. The guardian is but an officer of the court. e.g., Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978); Annot. Discretion of Court to Vacate Its Approval of Settlement or Release in Respect of Personal Injury to Minor, 8 A.L.R.2d 460 (1949). While the infant sues or defends through a next friend or guardian, every step in the proceeding occurs under the aegis of the court. Id.

Indeed, from the time of the early courts of chancery, a guardian ad litem has been unable to bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the settlement fairly promotes the interest of the minor. Dacanay, supra at 1079.

In this case, however, the Utah Supreme Court, knowing that the probate judge did not evaluate the underlying claim, ruled that the settlement hearing was "conducted in a jurisprudential manner." p. A-15, infra. The Utah Supreme Court refused to consider whether the minor child was denied his rights to due process. p. A-27, et. seq., infra.

The Utah Supreme Court's failure to implement the traditional procedural protections available to minors, raises an important question of first impression in this court. To what extent does the due process clause impose upon the probate court a duty to investigate and weigh a proposed minor settlement when the minor is represented only by his parents or an attorney who also represents an adverse client?

It is important that this Court rule on the issue because the Utah Court's standard procedure could be repeated across the country on a daily basis. Countless children could be deprived of their constitutional right to due process by probate courts.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE APPLICATION OF "WHETHER A FAIR MINDED JURY COULD RETURN A VERDICT" CRITERIA TO SUMMARY JUDGMENT MOTIONS DEPRIVES A LITIGANT OF HIS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AND/OR HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

A. The Fair-minded Jury Criteria and its Application by the Utah Supreme Court.

The purpose of summary judgment was never to cut litigants off from their rights to a trial by jury if they have evidence to offer on material issues at trial. e.g., Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940). To withstand a motion for summary judgment:

> [A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury to resolve the parties' differing version of the truth at trial.

First National Bank v. Cities Services, 391 U.S. 253, 288-89 (1968).

However, in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) this Court ruled that the criteria for determining a summary judgment motion is the same as that for determining whether a directed verdict should be entered.

> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a); which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

* * *

> When determining if a genuine fact issue . . . exists . . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability. . . . For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.
>
> * * *
>
> The inquiry . . . [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.
>
> * * *
>
> [T]he judge must ask himself . . . whether a fair minded jury could return a verdict for the plaintiff upon the evidence presented.

477 U.S. 242, 250, 252, 254.

The foregoing language necessarily invited the Utah Supreme Court to weigh the evidence. See, Anderson, supra at 266 (Brennen, J. dissenting). The Utah Supreme Court accepted the invitation to weigh the evidence.

The Utah Supreme Court:

> Then the question in my mind is whether the evidence can be, is whether a reasonable jury could have found that he was their lawyer despite the fact that all the pleadings, that the captions they read or at least the captions of documents signed by your client says he's the lawyer for IHC?

* * *

> I mean, I'm trying to get to what a reasonable jury could decide.

* * *

> Could a reasonable jury conclude that if what the Atkinsons say is true with respect to their conversations with Mr. Morgan, and rejecting all Mr. Morgan's contrary statements which we have to do for the purposes of appeal, whether or not the jury could still go ahead and find support that Mr. Morgan was their attorney or at least in a limited engagement of one of these particularized circumstances Mr. DeBry talked about?

(Transcript of Proceeding, Oral Argument, April 11, 1990 pp. 11, 16, 22).

After weighing the evidence, the Utah Supreme Court concluded:

> [T]here is no genuine issue of material fact with regard to a legal malpractice claim. . . .

* * *

> [A]s a matter of law, no genuine issue of material fact exists with regard to the Atkinsons' allegations of fraud and negligent misrepresentation.

Atkinson, supra at 5, 6.

Of course, the foregoing weighing of the evidence and coming to a conclusion were all made without observing the demeanor of the witnesses and without cross-examination,

both fundamental rights available at trial but not in a summary judgment proceeding.

In summary, this case squarely presents the issue alluded to in Justice Brennen's dissenting opinion in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 267 (1986):

> [I]f the judge, on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

The wisdom of Justice Brennen's dissent is starkly revealed by this court. In this case, fact issues abound. (See Statement of the Case section, above.) However, the Utah Supreme Court simply preferred defendant's version of the facts. Likewise the Utah Supreme Court discounted plaintiffs' facts.

The Utah Supreme Court was able to engage in that fact analysis because of the fair minded jury test. The Utah Supreme Court simply concluded that a fair minded jury would believe the defendant and disbelieve the plaintiff.[2]

---

[2] Actually the Utah Supreme Court said: "The rule on summary judgment may apply even when some facts remain in dispute; we affirm summary judgment when all material facts are not genuinely controverted." Atkinson v. IHC Hospitals, Inc., 798 P.2d 733, 38 (Utah 1990).

On rehearing, plaintiffs filed an affidavit of a clinical psychologist.[3] Among other things, the psychologist testified that:

> I have been asked to review the depositions of Roger Atkinson, Polly Atkinson and Philip Fishler and to form certain conclusions.
>
> * * *
>
> I have read the opinion of the Utah Supreme Court where it is stated that:
>
> > It is clear from the record that the Atkinsons intentionally and advisedly declined to retain legal counsel, relying instead on the assistance of George Atkinson, Roger's father. . . .
> >
> > It is clear that the Atkinsons did not . . . rely upon Morgan or the probate judge to evaluate the fairness of the settlement.
>
> From the point of view of a psychologist, and based solely on the testimony I have read, it is entirely possible, if not probable, that the Atkinsons relied (at least in part) on the probate judge to insure the fairness of the settlement.
>
> * * *
>
> I have read the opinion of the Utah Supreme Court which states that:

---

[3] There was no reason to file the psychologist affidavit before rehearing because none of the parties raised the issue of the quality of the evidence. That issue was first raised in the Opinion of the Utah Supreme Court.

> First, the Atkinsons assert that IHC and Wetzel misrepresented Chad's true condition by telling them that Chad was "all right" and would be a "normal child." We find this assertion to be wholly inconsistent with the record and thus without merit. It is factually clear that the child's condition was not normal and that the child was not all right. Such conditions are what prompted the settlement. . . .

I cannot give an opinion on what the Atkinsons actually knew or did not know at that time. It seems to me, that would be the job of a jury after hearing all of the evidence. However, speaking as a psychologist, there is nothing inherently unreliable or untrustworthy about the testimony. . . . The Atkinsons were young and inexperienced (with a 10th grade education). It seems from the testimony that they received substantial reassurance from the doctors and the insurance adjusters. From a psychological point of view, they could very well have believed that Chad had recovered substantially from the injuries, and that, "with a little therapy or so forth . . . that he would be fine." With their lack of representation, reassurances that he (Chad) "looked good" given by doctors could have been understood by the Atkinsons as statements that he had recovered.

Based upon the testimony I have seen, and from the point of view of a psychologist, it is equally possible that the motivating force in the settlement was the encouragement of the insurance adjusters that:

> . . . Chad was progressing pretty normally and was looking good . . . and that we'd be

> getting free money if anything because Chad should grow up fairly normal.
>
> * * *

I have also read the Opinion of the Utah Supreme Court that:

> Morgan's explanation of the probate proceedings when viewed in the concept [sic] of this case, did not constitute the rendering of legal advice.

I am not trained as a lawyer or judge; and I, therefore, have no opinion on the technical meaning of the term "legal advice." Thus, I can easily accept the proposition that, from the point of view of a lawyer or judge, Morgan did not give "legal advice."

However, speaking as a psychologist, it seems fairly clear, from the point of view of two kids with a 10th grade education, that the Atkinsons thought they were getting "legal advice" from Morgan.

In short, a fair minded jury could very well have believed plaintiffs' version of the facts. However, the fair minded jury test in Anderson was used as a shield to keep the case from ever going to a jury. This is exactly the unjust result that Justice Brennen warned about.

Further, the issue is presented regardless of whether the Seventh Amendment applies to the States by way of the due process clause. Assuming arguendo that the Fourteenth Amendment does not require civil jury trials in Utah, the State has elected to provide for a constitutional right to a jury

trial in a civil case. UTAH CONST. art. I, § 10. The right to a civil jury trial is an integral part of the Utah trial system. International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418, 420-21 (Utah 1981).

Because Utah elects to provide the right to a jury trial in a civil case, it may not deny the right in a manner contrary to due process. See, Griffin v. People of the State of Illnois, 351 U.S. 12, 18 (1956). Thus, certiorari should be granted to determine whether applying the "fair minded jury criteria" to summary judgment motions denies a litigant his right to a trial by jury.

B. A Right to a Jury Trial.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

The fundamental right to a jury trial is of ancient origin. To Blackstone it was "the glory of the English law" and "the most translucent privilege which any subject can enjoy." 3 Comm. 379; Dimick v. Schiedt, 293 U.S. 474, 85 (1935).

The right to a jury trial in a civil case is a fundamental right:

> The right to a trial by jury is "a basic and fundamental feature of our system of federal jurisprudence."

Bailey v. Central Vermont Ry., 319 U.S. 350, 54 (1943).

C. Certiorari Should be Granted to Revisit the Issue of Whether the Seventh Amendment Right to a Jury Trial Applies to the States Through the Due Process Clause of the Fourteenth Amendment.

In Minneapolis & St. Louis RR. Co. v. Bombolis, 241 U.S. 211 (1916), the United States Supreme Court unequivocally held that the Seventh Amendment applies only to proceedings in Federal Courts. The rationale for the decision was:

> [T]he first ten Amendments, including of course the Seventh, are not concerned with State action and deal only with Federal Acts. . . . [A]s a necessary corollary . . . the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in State courts or the standards which must be applied concerning the same.

241 U.S. 217.

Today, the rationale no longer exists. The Fourteenth Amendment right to due process applies to States those specific rights contained in Amendments I-VI and VIII which

declare fundamental personal rights. Duncan v. Louisiana, 391 U.S. 145 (1968); Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981).

In addition, the present criteria for determining whether a specific provision of the Bill of Rights applies to the states through the due process clause is whether the provision is "fundamental to the American scheme of justice." If so, the same constitutional standards apply to both State and Federal governments. e.g., Benton v. Maryland, 395 U.S. 784 (1969). As set forth above, the right to a jury trial is a fundamental and basic feature of our system of justice. Bailey, supra.

D. Even if the United States Supreme Court Declines to Revisit the Issue of Whether the Seventh Amendment Applies to State Court Proceedings, Certiorari Should be Granted to Determine Whether Application of the Fair Minded Jury Criteria Deprived Petitioners of Other Civil Trial Rights Guaranteed by the Due Process Clause.

The Due Process clause requires, in a civil case, a fair trial before a fair decision maker. e.g., Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). Civil trial protections include the right to an evidentiary hearing; Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); the right to present a case before liability is determined; Brinkerhoff-Faris Trust & Savings Co. v. Hill,

281 U.S. 673 (1930); and the right to cross-examine witnesses. Kaelin v. Louisville, 643 S.W.2d 590 (Ky. 1982). See, Watkins v. Sowders, 449 U.S. 341 (1981).

The Utah Supreme Court's weighing of the conflicting evidence, in this case, necessarily restricted or deprived the petitioners of each of the above rights. There was no cross examination. There was no trial. The evidence was limited to a paper presentation. Certiorari should be granted to determine whether the court's weighing of the evidence deprived or unduly restricted petitioners' civil trial rights as guaranteed by the due process clause.

CONCLUSION

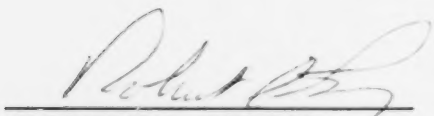
This case involves two important questions of federal law which have not been, but should be, settled by this Court.

First, whether a child's right to due process was denied when a probate court judge approved an inadequate settlement agreement, with no attempt to evaluate the underlying medical malpractice claim; and second, when there is credible conflicting evidence on material fact issues, is a plaintiff's Seventh Amendment right to a jury trial and/or procedural right to due process denied when the appellate court, in upholding summary judgment, weighs credible

conflicting evidence and concludes that a reasonable jury would not enter a verdict in favor of the plaintiffs?

For these reasons, certiorari to the Utah Supreme Court should be granted.

Respectfully Submitted,



ROBERT J. DEBRY
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
(801) 262-8915
Counsel for Petitioners

DATED this 22 day of December, 1990.

IN THE SUPREME COURT OF UTAH

No. 880310

ROGER ATKINSON; POLLY ATKINSON;
and ROGER ATKINSON AND POLLY ATKINSON,
as guardians ad litem for CHAD ATKINSON,

Plaintiffs and Appellants,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE, HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I THROUGH X,

Defendants and Appellees.

Supreme Court of Utah.

July 3, 1990.
Rehearing Denied Sept. 25, 1990.

Dale F. Gardiner, Robert J. DeBry, Gordon Jensen, Salt Lake City, for plaintiffs and appellants.

Paul S. Felt, Salt Lake City, for Scott Wetzel Services and Scott Olsen.

B. Lloyd Poelman, Salt Lake City, for Intermountain Health Care Hospitals, Inc.

Carman Kipp, Heinz J. Mahler, Salt Lake City, for Stephen G. Morgan and Morgan, Scalley & Reading.

HALL, Chief Justice:

Plaintiffs appeal from summary judgment granted to all defendants in the Third Judicial District Court, Salt Lake County. The trial court determined that no genuine issues of material fact existed with respect to plaintiffs' complaint for legal malpractice, fraud, and negligent misrepresentation. We affirm.

Polly Atkinson and Roger Atkinson ("the Atkinsons") are the parents and guardians ad litem of Chad Atkinson, a minor, who was born on March 2, 1983. On March 4, 1983, while still in Primary Children's Medical Center, Chad aspirated digestive material that filled his lungs, causing a lack of oxygen (anoxia), which resulted in permanent brain damage. It is alleged that a nurse shut off the warning device monitoring Chad prior to the incident.

After the injury, defendant Intermountain Health Care, Inc. ("IHC"), initiated negotiations with the Atkinsons through IHC's insurance adjuster, Scott Wetzel Services, Inc. ("Wetzel"). Scott Olsen, an employee of Wetzel, met with the Atkinsons four or five times to discuss Chad's condition and possible settlement terms. After the terms, conditions,

and amounts of the settlement had been fully agreed upon, Wetzel retained an attorney, Steve Morgan, for the purpose of drafting the documents necessary for presentation to the probate court for approval of the settlement as required by law for all settlements involving minors.[1] The Atkinsons claim that they understood Morgan to be their attorney and that he acted in that capacity for them in explaining the terms of the agreement and appearing on their behalf in the probate court proceeding where the Atkinsons were appointed guardians of Chad.

The Atkinsons were considered adults at the time of Chad's birth and during the settlement by reason of their marriage.[2] Neither Roger nor Polly had progressed beyond the tenth grade, nor are they presently high school graduates. They were, however, assisted in the settlement negotiations by Roger's father, George Atkinson, who was a union negotiator and who prepared a ten-page counterproposal.

The Atkinsons settled on a total amount of $1,280,000, assuming a normal life of 65 years for Chad. The settlement

---

[1] *See* Utah Code Ann. §§ 75-5-401 to -433 (1978).

[2] Utah Code Ann. § 15-2-1 (1953).

was structured, with payments to be spread out over a number of years, and had a present-day value of $118,000.

In the trial court, the Atkinsons claimed that the settlement was insufficient, that they, were not adequately represented by Steve Morgan, and that IHC and Wetzel misrepresented to them the severity of Chad's injuries. The trial court granted all of defendants' motions for summary judgment, and the Atkinsons appeal that order.

This court has held, "Summary judgment is appropriate if the pleadings and all other submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[3] Our review on appeal requires a determination of the existence of any issues of material fact with regard to (1) whether attorney Steve Morgan owed a duty to the Atkinsons or acted in a representative capacity, and (2) whether the settlement and release obtained by Wetzel for IHC was done so by means of fraud or negligent misrepresentation.

I. ATTORNEY-CLIENT REPRESENTATION

The Atkinsons claim that attorney Steve Morgan represented them throughout the probate hearings to approve the

---

[3] Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980); *see also* Utah R.Civ.P. 56(c).

settlement and management of Chad's estate. The Atkinsons present four theories upon which they believe that Mr. Morgan assumed the duty to represent their interests: (1) implied contract, (2) limited attorney-client relationship, (3) third-party liability, and (4) volunteer legal advice.

A. Implied Contract and Limited Attorney-Client Relationship

[1] The record is clear that the Atkinsons did not consider Morgan their attorney at any time during his involvement in the probate proceedings. Despite the fact that Scott Olsen, manager of Wetzel, suggested that Morgan's services be utilized to prepare the necessary documents for the probate hearing, there are a number of indicators which confirm that the Atkinsons did not rely on Morgan's experience, skill, or expertise with regard to the adequacy of the settlement.

First, all of the pleadings and documents that were prepared and filed by Morgan indicated clearly that Morgan was representing IHC, not the Atkinsons. The Atkinsons had an opportunity to review the documents and apparently did discuss the settlement with an attorney of their choosing.

Second, there was no contract of employment or retainer agreement between the Atkinsons and Morgan. They did not hire Morgan, nor did they pay for any services performed.

Rather, it is clear from the record that Morgan was hired by IHC, which in turn paid for his services.

Third, the probate judge asked Mrs. Atkinson directly about her legal representation while Morgan was in the courtroom participating in the hearing:

> THE COURT: Have you sought the advice of legal counsel in this matter?
>
> MRS. ATKINSON: I have talked to someone about it, but we are not planning on getting a lawyer.
>
> THE COURT: Have you talked to a lawyer?
>
> MRS. ATKINSON: Yes. I've just asked him a few things about it, and he said that we really should not--we shouldn't have to sue them if they are giving us an offer.

It is thus clear that the Atkinsons exercised the right which was theirs to represent themselves and to proceed without the benefit of counsel. It is equally clear that they did not consider Morgan to be their attorney and that they did not seek his advice with respect to the merits of the settlement agreement. In the absence of an attorney-client relationship, Morgan owed no implied contractual duty to the Atkinsons, nor did there exist a limited attorney-client relationship.

B. Third-Party Liability

[2] The Atkinsons next claim is that Morgan owed them a duty under a theory of third-party liability. We have yet to fully address the theory of third-party liability, and we have not allowed recovery in any of the cases where third-party liability was in issue.[4]

Cases cited by the Atkinsons from other jurisdictions state that in order to establish a cause of action under this theory, the Atkinsons must

> allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.[5]

Indeed, the third-party liability theory "does not supplant entirely the strict privity rule, but instead operates as a

---

[4] *See,* Hughes v. Housley, 599 P.2d 1250 (Utah 1979) (second attorney was not liable to the first attorney in negligently handling a motion for relief from default); Milliner v Elmer Fox & Co., 529 P.2d 806 (Utah 1974) (attorneys who prepared corporate document for filing with securities & exchange commission not liable to purchasers of shares).

[5] Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618, 625 (1985).

limited exception to that rule."[6] Cases utilizing the third-party liability theory involve drafting and administering wills and estates,[7] fraudulent misrepresentations,[8] creditors of a corporation in receivership,[9] purchasers at a foreclosure sale where attorneys conducted the sale improperly,[10] and giving a legal opinion on a bond.[11] Indeed, "any duty owed

---

6

Id. 492 A.2d at 624.

7

Kirgan v. Parks, 60 Md.App. 1, 478 A.2d 713, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984).

8

McElhanon v. Hing, 151 Ariz. 386, 728 P.2d 256 (Ct.App.1985), *affirmed in part, vacated in part*, 151 Ariz. 403, 728 P.2d 273 (1986), *cert. denied*, 481 U.S. 1030, 107 S.Ct. 1956, 95 L.Ed.2d 529 (1987); LaFountaine v. State Farm Mut. Auto. Ins., 215 Mont. 402, 698 P.2d 410 (1985).

9

Prescott v. Coppage, 266 Md. 562, 296 A.2d 150 (1972).

10

Clagett v. Dacy, 47 Md.App. 23, 420 A.2d 1285 (1990).

11

Bradford Securities Processing Servs., Inc. v. Plaza Bank and Trust, 653 P.2d 188 (Okl. 1982).

by an attorney to a third party is derivative of the duty owed by that attorney to his client."[12]

The instant case is nothing like the other cases adopting the third-party liability theory. The settlement of a potential claim or a lawsuit is not the kind of benefit envisioned in the third-party liability theory. Despite the fact that IHC and the Atkinsons had reached a settlement agreement, they were still potential adversaries in litigation.

Morgan, who had a contractual duty to represent IHC, had no corresponding duty to assure that the settlement for the Atkinsons was sufficient to fit their needs. The basis of our judicial system is the adversarial model, a concept which is foreign to the placement of a duty upon counsel to represent the best interests of both sides. The third-party liability theory is thus inapposite to the factual context of the instant case.

C. Volunteer Legal Advice

[3] The Atkinsons' final claim against Morgan is that by offering volunteer legal advice he undertook a duty to act in their best interests. The "legal advice" Morgan gave was an

---

12

Franko v. Mitchell, 158 Ariz. 391, 762 P.2d 1345, 1354 (App. 1988); *see also* Fickett v. Superior Court of Pima County, 27 Ariz.App. 793, 558 P.2d 988 (1976).

explanation of the probate documents, specifically the order approving settlement of a minor's claim. Morgan testified: "I read that document to them and explained to them that in order for the court to approve and sign this Order, that the court would have to find that the settlement in all respects was fair." Not only is the above a true statement of the law,[13] but also the court approved the settlement upon Mr. Atkinson's statement that he believed it to be fair:

> THE COURT: And your name, sir?
>
> MR. ATKINSON: Roger W. Atkinson.
>
> THE COURT: Are you the father of the child?
>
> MR. ATKINSON: Yes.
>
> THE COURT: Do you believe that you, on behalf of the child, have a claim against Intermountain Health Care?
>
> MR. ATKINSON: Yes, I do.
>
> THE COURT: It's my understanding that there's a structured settlement of a total payout of $900,000?
>
> MR. ATKINSON: Yes, sir.
>
> THE COURT: Do you feel that this is adequate?
>
> MR. ATKINSON: Yah, I do, considering the hospitalization and everything like that will be covered.

---

[13] Utah Code Ann. § 75-5-409(2) (1978).

THE COURT: Do you feel this is in the best interest of the child?

MR. ATKINSON: I do.

THE COURT: All right. I will approve the settlement.

The Atkinsons cite no cases on point for the proposition that "[a]n attorney who gives gratuitous advice will be held to the same standard of care as if he were under formal retainer.[14] While some jurisdictions have recognized a cause of action when legal advice was volunteered, we have yet to address this issue. Nevertheless, we find the cases cited by the Atkinsons to be easily distinguishable from the present case, where an explanation of the probate proceedings was incumbent upon Morgan. Morgan's explanation of the probate proceedings, when viewed in the concept of this case, did not constitute the rendering of legal advice.

It is clear that the Atkinsons did not consider Morgan to be their attorney, nor did they rely upon Morgan or the probate judge to evaluate the fairness of the settlement. The Atkinsons made an independent evaluation of the settlement and concluded that it was fair. We therefore affirm the trial court's determination that there is no genuine issue of

---

[14] Franko, 762 P.2d at 1351.

material fact with regard to a legal malpractice claim against Morgan.

II. FRAUD AND MISREPRESENTATION

[4] The Atkinsons' second claim is that the terms and conditions of the settlement agreement and Chad's condition were fraudulently or negligently misrepresented to them. More specifically, the Atkinsons claim that the settlement was inadequate in light of Chad's condition and that because of their age and inexperience, defendants took advantage of them as Chad's guardians.

First, the Atkinsons assert that IHC and Wetzel misrepresented Chad's true condition by telling them that Chad was "all right" and would be a "normal child." We find this assertion to be wholly inconsistent with the record and thus without merit. It is factually clear that the child's condition was not normal and that the child was not all right. Such conditions are what prompted the settlement reached of all claims for a total of $1,280,000.

Second, the Atkinsons' underlying argument is that they were fraudulently induced or negligently misled into agreeing to an inadequate settlement for Chad. The Atkinsons were considered adults and did not enter into the settlement agreement with their eyes closed. As hereinabove noted, it

is clear from the record that the Atkinsons intentionally and advisedly declined to retain legal counsel, relying instead upon the assistance of George Atkinson, Roger's father, a union negotiator who formulated a ten-page counterproposal for the settlement. The transaction does not have the appearance of having been made other than at arm's length.

[5] We have heretofore defined fraud as "a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon upon which the plaintiff reasonably relies to his detriment."[15] Negligent misrepresentation is a form of fraud which occurs when

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by the justifiable reliance upon the information, if he fails to

---

15

Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980); *see also* Taylor v. Gastor, Inc., 607 P.2d 293, 294 (Utah 1980); Masters v. Worsley, 777 P.2d 499, 501-02 (Utah Ct.App. 1989); Conder v. A.L Williams & Assoc., Inc., 739 P.2d 634, 637 (Utah Ct.App. 1987).

exercise reasonable care or competence in obtaining or communicating the information.[16]

It appears from the record that the Atkinsons were fully informed that the extent of Chad's brain damage was not yet determinable or certain. The unchallenged language of the release that the Atkinsons read and signed unequivocally stated: "The undersigneds hereby declare and represent that the injuries sustained by Chad Atkinson are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite. . . . "

Also undisputed is the fact that Wetzel offered to send Chad to a specialist in Arizona for tests to evaluate the extent of the brain damage before settlement. In addition, Wetzel offered to wait until the full extent of the brain damage was known before solidifying the terms of the settlement. The Atkinsons refused both of these proposals, opting instead to obtain an immediate settlement.

Furthermore, the trial court questioned the Atkinsons extensively regarding their comprehension of Chad's condition and the implications of the settlement:

THE COURT: Do you understand that by settling this case, and regardless of what later transpires, when you

---

16

Restatement (Second) of Torts § 552 (1977).

> find out later that the child's injury is worse than you anticipated, and on the other hand even if it's better, that you will not ever be able to come back against Intermountain Health Care? Do you understand that?
>
> MRS. ATKINSON: Yes, sir, I do.

For the aforementioned reasons, we conclude that the probate hearing was conducted in a jurisprudential manner and that the Atkinsons participated with full knowledge of Chad's rights and the implications of their actions upon any future causes of action against IHC or Wetzel.

Furthermore, the release signed by the Atkinsons was done with full knowledge of Chad's rights, which has the effect of barring this cause of action. he release signed by the Atkinsons acquits IHC and their agent, Wetzel,

> from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever . . . on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries . . . resulting or to result from the accident. . . .

We affirm the trial court's determination that, as a matter of law, no genuine issue of material fact exists with regard to the Atkinsons' allegations of fraud and negligent misrepresen-

tation.[17] We have duly considered the Atkinsons' other claims and find them to be without merit.

Affirmed.

HOWE, Associate, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ. concur.

17

The rule on summary judgment may apply even when some fact remains in dispute; we affirm summary judgment when all material facts are not *genuinely controverted*. See, Heglar Ranch, 619 P.2d at 1391.

IN THE THIRD JUDICIAL DISTRICT COURT
STATE OF UTAH

No. C87-4908

ROGER ATKINSON; POLLY ATKINSON; and ROGER ATKINSON AND POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON,

Plaintiffs,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE, HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I THROUGH X,

Defendants.

ORDER OF THE COURT

ENTERED: April 8, 1988

The motion of defendants Stephen G. Morgan and Morgan, Scalley & Reading for Summary Judgement came on as scheduled for hearing on March 28, 1988 at 9:00 a.m., before the Honorable David Young, District Court Judge; plaintiffs being represented by their attorney Dale Gardiner of the firm Robert J. DeBry & Associates; defendants

Stephen G. Morgan and Morgan, Scalley & Reading being represented by Carman E. Kipp of the firm of Kipp and Christian, P.C., and attorney Paul Felt appearing for Defendant Scott Wetzel and the Court having reviewed the briefs, affidavits and discovery materials which had been filed by counsel and having heard the arguments of counsel and being fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants Stephen G. Morgan and Morgan, Scalley & Readings' Motion for Summary Judgment of no cause of action in their favor and against plaintiffs should be and the same is hereby granted.

_____

DAVID S. YOUNG
District Judge

IN THE THIRD JUDICIAL DISTRICT COURT

STATE OF UTAH

No. C87-4908

ROGER ATKINSON, POLLY ATKINSON
and ROGER ATKINSON AND POLLY ATKINSON,
as guardians ad litem for CHAD ATKINSON,

Plaintiffs,

vs.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation SCOTT OLSEN; STEPHEN G. MORGAN, MORGAN, SCALLEY & READING and JOHN DOES I THROUGH X,

Defendants.

ORDER GRANTING THE MOTIONS FOR SUMMARY JUDGMENT OF IHC HOSPITALS, INC., SCOTT WETZEL SERVICES, INC. AND SCOTT OLSEN

ENTERED: July 11, 1988

The motion of Defendant IHC Hospitals, Inc. for summary judgment and the motion of Defendants Scott Wetzel Services, Inc. and Scott Olsen for summary judgment came on as noticed for hearing on the 13th day of June,

1988, before the Honorable David S. Young, District Judge, with Dale F. Gardiner of Robert J. DeBry & Associates appearing on behalf of the plaintiffs, David B. Erickson of Kirton, McConkie & Bushnell on behalf of Defendant Intermountain Health Care, Paul S. Felt of Ray, Quinney & Nebeker appearing on behalf of Defendants Scott Wetzel Services, Inc. and Scott Olsen and Shawn McGarry of Kipp & Christian appearing on behalf of Defendants Stephen G. Morgan and Morgan, Scalley & Reading. Plaintiffs' motion to file a second amended complaint and plaintiff's motion to compel discovery against IHC were also heard. Based upon the pleadings, memoranda on file, argument of counsel and good cause here appearing,

IT IS HEREBY ORDERED that Defendant IHC's motion for summary judgment be and is hereby granted and that Plaintiffs' Complaint against IHC is dismissed with prejudice and on the merits.

IT IS FURTHER ORDERED THAT Defendant Scott Wetzel Services, Inc. and Scott Olsen's motion for summary judgment be and hereby is granted. Plaintiffs' Complaint against Scott Wetzel Services, Inc. and Scott Olsen is dismissed with prejudice and on the merits.

IT IS FURTHER ORDERED that Plaintiffs' motion to file a second amended complaint and Plaintiffs' motion to

compel discovery against Defendant IHC be and are hereby denied.

DAVID S. YOUNG
District Judge

IN THE UTAH SUPREME COURT

OFFICE OF THE CLERK
No. 880310

ROGER ATKINSON; POLLY ATKINSON; and ROGER ATKINSON AND POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON,

Plaintiffs and Appellants,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING and JOHN DOES I THROUGH X,

Defendants and Appellees.

ENTERED: September 25, 1990

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler
Clerk

UTAH RULES OF CIVIL PROCEDURE

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlo-

cutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion**. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required**. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served

therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable**. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith**. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable

attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CONSTITUTIONAL PROVISIONS

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE UTAH SUPREME COURT

No. 880310

ROGER ATKINSON; POLLY ATKINSON and ROGER ATKINSON AND POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON,

Plaintiffs/Appellants,

vs.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE, HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I THROUGH X,

Defendants/Respondents.

PETITION FOR REHEARING

ARGUMENT

POINT I

THE COURT SHOULD GRANT REHEARING TO CORRECT AN ERROR OF LAW WHICH IS LIKELY TO BE REPEATED IN HUNDREDS OF OTHER CASES

An essential part of this case was whether or not the probate proceedings were defective. The Atkinsons asked this Court, inter alia, to remand with instructions to

reprocess the probate hearing (See Brief of Appellant at Point IV and Reply Brief of Appellant at Point XIV.)

This Court did not agree that the probate hearing was defective. Specifically, this Court ruled that:

> . . . the Court approved the settlement upon Mr. Atkinson's statement that he believed it to be fair.
>
> * * *
>
> . . . we conclude that the probate hearing was conducted in a jurisprudential manner.

(Slip Opinion at p. 5 & 9.)

However, the opinion of the court overlooks the clear and specific mandate of the legislature:

> The court may ratify any [minor's settlement] if the court determines that the transaction is in the best interests of the protected person.

Utah Code Ann. § 75-5-409(2).

This Court's opinion concludes that the court can make that "determination" simply by asking the guardians if they were satisfied. In other jurisdictions, the rule seems to be well settled that:

> Whenever a court is called upon to sanction a compromise of an infant's claim or to enter a consent judgment upon the basis of such a compromise, it is bound to investigate the fairness of the compromise and whether its terms are for the interest of the infant, even if the infant is represented by counsel. The court in such a case should not rely solely upon the statement of the infant's parents or his next friend

> that a satisfactory settlement has been made, nor should it rely without investigation upon the statement of counsel that counsel has reached a satisfactory settlement. There should be a hearing of such testimony or the ascertainment of such facts as will fully convince the court that the judgment it is entering will fully protect the infant's rights and interests. 42 Am.Jur.2d Infants, § 154 (1969). (Emphasis added.)

In what has been termed the "leading case" on this issue (8 A.L.R.2d 460, Anno.--Vacating Approval of Settlement), the Kansas Supreme Court held that the court's duty "to protect the interests of infants was not performed by inquiring of the parents if they were satisfied with the agreement. . . ." The court also stated that if "there is no judicial investigation of the facts upon which the . . . recovery is based, the judgment . . . must be set aside in a proper proceeding when its effect, if allowed to stand, would be to bar the infant's rights." Missouri Pacific R. Co. v. Lasca, 99 P. 616 (Kan. 1909); See also, Perry v. Umberger, 65 P.2d 280, 282 (Kan. 1909).

In deciding whether a compromise was in the best interest of minors, the U.S. District Court in Tennessee considered the following factors: The amount of the fund in its totality, as well as the amount offered the children; the character of evidence which the children must present to recover the whole fund; expenses incident to procurement of

necessary testimony; and the possibility that children might lose all interest in the fund. Western Life Ins. Co. v. Nanney, 290 F.Supp. 687 (C.D. Tenn. 1968).

In this case, the trial court judge made no independent "determination" of the claim. Instead, the trial court judge relied upon the evaluation of a 19 year old boy (with a tenth grade education, who could barely read) and his 16 year old wife. (Both of whom were unrepresented by counsel?)

> Q: [to Judge Fishler]
> In the Atkinson case, you didn't evaluate the underlying claim against IHC did you?
>
> A: No, I didn't.

(Fishler deposition at p. 51.)

That is not only unjust result in this case, the error will surely be repeated in hundreds of other probate hearings. Rehearing should be granted to correct the error in this case, and to avoid a repeat of such errors in future cases.

POINT II

THE OPINION IN THIS CASE IS BASED UPON AN UNCONSTITUTIONAL MEASURING STICK

The opinion in this case concludes that:

> . . . there is no genuine issue of material fact with respect to the legal malpractice claim against Morgan.

* * *

> . . . as a matter of law, no genuine issue of material fact exists with regard to the Atkinsons' allegations of fraud and negligent misrepresentation.

(Slip Opinion at p. 7 & 9.)

However, fact issues abound. (See paragraphs A through E below.) Indeed, virtually each sentence of the Court's Opinion is contradicted by direct evidence.

The true basis for this Court's Opinion seems to be that the Court does not trust the Atkinsons' facts. The Court has apparently used a legal tool which would weed out -- or discard -- facts which the Court does not trust. That legal tool is best summed up in a footnote:

> The rule or summary judgment may apply even when some fact remains in dispute; we affirm summary judgment when all material facts are not genuinely controverted.[1] (Emphasis in original.)

(Slip Opinion at p. 9 n. 17.)

In a rather similar vein, this Court concluded that:

> Atkinsons assert that IHC and Wetzel misrepresented Chad's true condition by telling them that Chad was "all right" and would be a "normal child." We find

---

[1] The opinion cites Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390 (Utah 1980) for the proposition that the court can ignore fact issues which are not "genuinely controverted." (Slip Opinion at p. 7.). However, Heglar is different. In Heglar, the fact issues would not have constituted a valid claim even if proven.

> this assertion to be wholly inconsistent with the record and thus without merit. (Emphasis added.)

(Slip Opinion at p. 7.)

The short answer is that there is nothing inherently unreasonable or untrustworthy about the Atkinsons' fact showing. Reasonable minds could differ and reach different conclusions. (See affidavit of Richard King Mower attached.[2])

The long answer is that juries (and not judges) decide fact disputes. Courts should not throw out fact disputes simply because the judges are not convinced. Nor should judges throw out fact disputes because the facts seem untrustworthy to the judge. To do so would be an unconstitutional infringement upon the right to a jury trial.[3]

---

[2] It is rather late to submit this type of affidavit on a Petition for Rehearing; however, neither the trial court, nor the parties ever raised the issue of "genuinely controverted" (or unreliable) facts. That test reared its head for the first time in the opinion and therefore there was no reason to file such an affidavit earlier. c.f., Pointer v. Hill, 536 P.2d 358 (Okla. 1975).

[3] It is likewise late in the game to raise constitutional issues. However, the test used by this court ("genuinely controverted") as a tool to weed out fact issues was never raised by the trial court judge nor the briefs of opposing counsel. Thus, there was no reason, until now, to raise the constitutional issue.

The trial court was vested with no discretion. The federal Constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by decision of contested issues by the judge at hearings in camera before trial. Griffeth v. Utah Power & Light Co., 226 F.2d 661 669 (9th Cir. 1955).

* * *

It is especially necessary to be cautious in making such a determination [to grant summary judgment] where, as here, a jury trial has been demanded." Cameron v. Vancouver Plywood Corp., 266 F.2d 535, 540 (9th Cir. 1959).

* * *

Summary judgment "valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial. Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind." Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940).

* * *

Since we are dealing with a procedure that operates in the shadow of the Seventh Amendment's guarantee

---

In any event, the court can consider this same issue without considering the constitutional garb. Based upon the record (paragraphs A-E below). The court can simply rule that there are fact issues which preclude summary judgment within the meaning of Rule 56.

> of trial by jury, if there is any doubt as to the existence of a genuine issue of fact, summary judgment cannot be granted." Elliott v. Elliott, 49 F.R.D. 283, 284 (D.C.N.Y. 1970).

Although Utah cases do not discuss the Constitutional guarantees, the result is the same: Bowen v. Riverton City, 656 P.2d 434 (Utah 1982) (Court to review evidence in the light most favorable to non-moving party.) Sandberg v. Klein, 576 P.2d 1291 (Utah 1978) (Court cannot consider weight of evidence or credibility of witnesses.) Salt Lake City Corp. v. James Constructors, 761 P.2d 42 (Ut. Ct. App. 1988) (In order to defeat summary judgment it is not necessary for a party to prove its legal theory.)

ROBERT J. DEBRY

JULY 20, 1990